Supreme Court, U. S.
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No. 79-1806

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

BISSO TOWBOAT COMPANY,
Petitioner,

versus

LEO BAZILE,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals
For the Fifth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

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# RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Leo Bazile, prays that this Honorable Court deny the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on November 8, 1979.

## OPINIONS BELOW

The District Court for the Eastern District of Louisiana issued an unreported minute entry on December 17, 1976, which is reprinted in Appendix B in the Petition. The opinion of the Fifth Circuit, entered on November 8, 1979, is reported at 606 F.2d 101 (5th Cir. 1979). (Petitioner's Appendix A). Rehearing and Rehearing En Banc were denied on February 14, 1980, as reported at 613 F.2d 314.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTIONS PRESENTED

Whether the Fifth Circuit erred in holding that a lay jury rather than the District Court is to be the sole trier of fact with respect to determination of the presence or absence of the District Court's jurisdiction over the subject matter before it.

## STATEMENT

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioner's Appendix A) at pages 1-A through 5-A in the Petitioner's Brief. Respondent disagrees with the statement of the case as set forth by

the Petitioner to the extent that it does not include all of the facts as set forth in the Court of Appeals Opinion.

## ARGUMENT

### I. The Fifth Circuit's Decision Is Not Contrary To This Court's Holding In *Senko vs. Lacrosse Dredging Corporation.*[1]

In its Brief, the Petitioner states that the Fifth Circuit ignored the *Senko* decision and actually announced a contrary rule of law for jurisdictional determinations. The Petitioner states this error occurs as a result of the Court of Appeals relying on *Lavender vs. Kurn*[2] in reversing the District Court's granting of a Judgment Notwithstanding the Verdict. Clearly, the Court of Appeals did not follow Lavender, supra, in making its determination. The pertinent part of the Court's Opinion is found on Page 7-A of the Petitioner's Brief where the Court applied the standard as set forth in *Boeing Company vs. Shipman:*[3]

> "We find that even applying the less strict standard of *Shipman,* the granting of the Motion for a Judgment Notwithstanding the Verdict was improper. There was sufficient

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1 352 U.S. 370, 1 L.Ed.2d 404, 77 S.Ct. 415 (1956).

2 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1945).

3 411 F.2d 365 (5th Cir. 1965).

testimony from the plaintiff to support that he was a seaman."

The standard for granting a Motion for Judgment Notwithstanding the Verdict requires that the Trial Court review all the evidence in the light most favorable to the opponent of the Motion and if the Trial Court still finds that the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary verdict, the Motion for Judgment Notwithstanding the Verdict should be granted. *Boeing Company vs. Shipman, supra.* This was the standard applied by the Fifth Circuit which Respondent submits was correct.

For the foregoing reasons, it is respectfully submitted that this contention of the Petitioner is without merit.

## II. The Fifth Circuit's Decision Is In Accord With All Prevailing Jurisprudence.

On Page 11 of the Petition, the Petitioner again states the Fifth Circuit erred in applying the *Lavender vs. Kurn, supra,* test in deciding the Seaman Status under the Jones Act. As was pointed out by Respondent in the foregoing section, it is clear that the Fifth Circuit did not apply the Lavender test in making its ruling. Accordingly, this contention is also without merit.

## III. The Fifth Circuit Did Not Apply *Lavender vs. Kurn* To The Issue Of Seaman's Status.

Again the Petitioner insists that the Fifth Circuit is applying *Lavender vs. Kurn* to the Issue of Seaman's Status. It is clear from the Fifth Circuit's Opinion that this was not done. The Fifth Circuit applied the standard as set forth in *Boeing vs. Shipman, supra.* The Fifth Circuit reversed the Trial Court ruling that all of the evidence, reviewed in the light most favorable to Mr. Bazile, could have supported a finding of Seaman Status.

At the trial, Respondent stated that he had formally been a deck-hand on several of the Petitioner's vessels. In addition, he had helped run the Cappy and was a "stand-by" on that vessel. He also described various jobs he had done on various vessels as set forth on Page 3-A of the Petition.

Based on the foregoing testimony, Respondent submits the Fifth Circuit was correct in holding there was sufficient evidence to support a finding of Seaman's Status.

The Petitioner submits that the effect of the Fifth Circuit's Opinion herein creates Constitutional infirmities and lack of judicial economy by limiting the Judicial Court's power over the Jurisdictional issue of Seaman's Status. In support of this argument, the Peti-

tioner offers the ludicrous example of a circus clown bringing a Jones Act Suit. Perhaps a more appropriate hypothet would be that of an employee whose duties included many of the traditional duties done by seaman, i.e. — deck-hand work, handling lines, painting and chipping, tying and untying vessels and the like, who is injured when one of his employer's vessels rams a dock causing the employee to slip and fall. Suppose then, the employee brings a Jones Act Suit alleging Seaman's Status. Suppose further, in an effort to defeat the employee's claim, the employer introduces questionable documentary evidence in defense of the employee's claim and parades several of its other employees into Court with the same objective. Finally, further suppose that the owner of the company, when confronted with a United States Public Health Masters Certificate, which classifies the employee as a deck-hand/wiper on a vessel in his fleet, states he falsified the certificate in order to help the employee obtain hospital care. (See Page 9-A of Petition, Footnote 2). Given these circumstances, the Respondent respectfully submits that the granting of a Judgment Notwithstanding the Verdict finding Seaman's Status would be clear error. Accordingly, this contention is also without merit.

## IV. The Fifth Circuit's Decision Is In Accord With Decisions In All Other Circuits.

Again Petitioner contends its position has merit because not one Court, State or Federal, Trial or

Appellate, has ever applied the *Lavender* "any evidence" standard to the Jurisdictional question of Seaman's Status. It is quite clear the Fifth Circuit did not apply this standard in reversing the Trial Court. The Petitioner's continuous reliance on this contention shows there is no merit to its position whatsoever.

### V. Respondent's Claim Is That Of A Seaman Under The Jones Act For Negligence.

In Part V of Petitioner's Brief, the Petitioner takes it upon itself to advise this Honorable Court that the Respondent is covered under the Longshoreman's and Harbor Workers' Compensation Act. Fortunately, for Respondent, the Petitioner is not the trier of facts in this matter. The obvious weakness of the Petitioner's determination of the Respondent status is readily apparent from the record herein. A jury of reasonable men who have previously heard all of the evidence in this matter, has made a factual finding that the Respondent was a Seaman. No other comment need be made regarding this part of the Petitioner's Brief.

## CONCLUSION

Considering the foregoing, Respondent submits that the decision below is clearly correct. It is obvious that there are no decisions of other Circuits in conflict with the Fifth Circuit regarding the test to be applied to Sea-

man Status. Manifestly, there is no important question of Constitutional Law requiring review by this Court.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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## CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing petition were served on Winston Edward Rice, Esq., of New Orleans, Louisiana this date by mailing same as required by Rule 33-1 of this Court.

New Orleans, Louisiana, July ____, 1980.

DARRYL J. TSCHIRN

JOHN M. ROBIN